

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

MARION LEE CROSS,

No. 15-cv-3146 LB

Plaintiff,

**ORDER OF SERVICE AND PARTIAL  
DISMISSAL**

v.

[Re: ECF No. 1]

CHUCK ETCHISON; et al.,

Defendants.

**INTRODUCTION**

Marion Lee Cross, currently a prisoner at the California Correctional Center in Susanville, filed this *pro se* prisoner's civil rights action under 42 U.S.C. § 1983. He consented to proceed before a magistrate judge. (ECF No. 1 at 4.) This action is now before the court for review of Mr. Cross' complaint. This order finds Mr. Cross's excessive force claim cognizable, directs the U.S. Marshal to serve process on one defendant and dismisses the other two defendants.

**STATEMENT**

The complaint alleges that Mr. Cross was "sentenced" by the "Manteca Superior Court" to a "court appointed" drug treatment program called the Jericho Project in Brisbane, California. (ECF No. 1 at 3.) While attending the drug treatment program, Mr. Cross "was choked out by the program director, Chuck Etchison on or about 7/31 or 8/1 2014." (*Id.*) Mr. Cross further alleges that the Daly City police chief will have "supporting document[s] for this claim." (*Id.*) In addition to

1 naming Mr. Etchison as a defendant, Mr. Cross names Jericho Project Inc. as a defendant “for  
2 employing Mr. Etchison.” *Id.* Mr. Cross also names “Manteca Superior Court” as a defendant for  
3 “sentencing [him] to a program where [he] was physically assaulted and later ignoring written proof  
4 of this assault and further sentencing [him] to four yrs. state prison as part of the same case.” *Id.*

### 5 ANALYSIS

6 A federal court must engage in a preliminary screening of any case in which a prisoner seeks  
7 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.  
8 § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims  
9 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
10 monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b). *Pro se*  
11 complaints must be liberally construed. *See Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

12 Federal courts are courts of limited jurisdiction. As relevant here, the court only has jurisdiction  
13 to entertain this action if it raises a federal question, such as a civil rights claim asserted under 42  
14 U.S.C. § 1983. (There are other federal statutes that grant other bases of federal court jurisdiction,  
15 but none are applicable to this action.) In simple terms, this action can go forward in federal court if  
16 a claim is stated under § 1983; if the complaint does not state a claim under § 1983, the plaintiff  
17 should pursue his claim in state court.

18 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right  
19 secured by the Constitution or laws of the United States was violated, and (2) that the violation was  
20 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48  
21 (1988).

22 Mr. Cross alleges that he was “choked out” by Mr. Etchison while at the Jericho Project. The  
23 constitutional right at issue when force is used on a person depends on the person’s status at the time  
24 of the incident. The Due Process Clause of the Fourteenth Amendment protects a pretrial detainee  
25 from the use of force that amounts to punishment. *Graham v. Connor*, 490 U.S. 386, 395 n.10  
26 (1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)). The Eighth Amendment’s prohibition  
27 of cruel and unusual punishments protects a convict from force used maliciously and sadistically for  
28 the very purpose of causing harm. *See generally Hudson v. McMillian*, 503 U.S. 1, 6 (1992). Mr.

1 Cross alleges that he was sentenced to the Jericho Project by the state court, which would suggest he  
2 was a convict at the relevant time, but it is not necessary to determine Mr. Cross's status for present  
3 purposes because (assuming state action existed) an allegation that a defendant choked a plaintiff  
4 would suffice to plead a claim under either the Due Process Clause or the Eighth Amendment.  
5 Liberally construed, the complaint states a cognizable § 1983 claim against Mr. Etchison for  
6 excessive force.

7 There is some question as to whether there was state action. Mr. Cross alleges that he was  
8 physically assaulted by the head of a "court appointed" drug treatment program to which he had  
9 been "sentenc[ed]" by a superior court. (ECF No. 1 at 3.) The court will assume for present  
10 purposes that, liberally construed, these allegations are sufficient to satisfy the second element of a §  
11 1983 claim for his claim against Mr Etchison. Determining whether a private party's conduct  
12 should be considered action under color of state law can be a difficult matter. *See generally*  
13 *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-98 (2001)  
14 (discussing tests and facts to be considered to determine whether actions taken by private individuals  
15 or organizations should be considered to be taken under color of state law). The determination may  
16 involve a detailed inquiry into the facts, many of which are better known to the defendant than the  
17 plaintiff, such as the specific relationship between the Jericho Project and the state court that  
18 allegedly sentenced the plaintiff to the program. *See generally Kelly v. N.J. Dept. of Corr.*, 2012  
19 WL 6203691, \*6 (D. N.J. 2012) (collecting cases and noting that "[f]ederal courts are split on the  
20 question of whether organizations that operate halfway houses, and their employees, are state actors  
21 for purposes of § 1983"). It therefore is preferable to let the defendant challenge the adequacy of the  
22 pleading or proof on this element rather than to attempt to obtain facts via an amended complaint  
23 from a plaintiff who may not know the details of the relationship between the state and the private  
24 party.

25 The complaint does not state a claim against the Jericho Project, which apparently was named as  
26 a defendant merely because it employed Mr. Etchison. There is no respondeat superior liability for  
27 the actions of the private entity's employees, i.e., no vicarious liability for the employer simply  
28 because it employed the wrongdoer. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir.

1 2012).

2 The complaint does not state a claim against the Manteca Superior Court. Mr. Cross alleges only  
3 that the Manteca Superior Court caused him to be sent to the program at which the alleged wrongful  
4 conduct occurred. Mr. Cross does not allege, for example, that the superior court ordered him to be  
5 choked at the Jericho Project or played any role in determining the operations at the Jericho Project.  
6 The conduct of which Mr. Cross complains – being choked – simply cannot be attributed to the  
7 Manteca Superior Court. *See Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982) (Medicaid recipients  
8 challenging decisions made by nursing homes to discharge or transfer them to lower levels of care  
9 failed to show that the state or state officials were responsible for those decisions); *id.* at 1003  
10 (“[t]his case is obviously different from those cases in which the defendant is a private party and the  
11 question is whether his conduct has sufficiently received the imprimatur of the State so as to make it  
12 ‘state’ action for purposes of the Fourteenth Amendment”). Just as a sentencing court is not a  
13 proper defendant in a routine § 1983 case about particular prison conditions a criminal defendant  
14 experiences during the course of his incarceration, the Manteca Superior Court is not a proper  
15 defendant in this § 1983 case about the particular conditions experienced at the treatment program to  
16 which it sentenced the plaintiff.

17 Finally, Mr. Cross states that he wants to assert a claim for damages based on the Manteca  
18 Superior Court “further sentencing [him] to four yrs. state prison as part of the same case.” (ECF  
19 No. 1 at 3.) Mr. Cross cannot challenge his criminal conviction or sentence in this civil rights  
20 action. The case of *Heck v. Humphrey*, 512 U.S. 477 (1994), held that a plaintiff cannot bring a civil  
21 rights action for damages for a wrongful conviction or imprisonment, or for other harm caused by  
22 actions whose unlawfulness would render a conviction or sentence invalid, unless that conviction or  
23 sentence already has been determined to be wrongful. *See id.* at 486-87. A conviction or sentence  
24 may be determined to be wrongful by, for example, being reversed on appeal or being set aside  
25 when a state or federal court issues a writ of habeas corpus. *See id.* The *Heck* rule also prevents a  
26 person from bringing an action that – even if it does not directly challenge the conviction or sentence  
27 – would imply that the conviction or sentence was invalid. The practical importance of this rule is  
28 that a plaintiff cannot attack his conviction *in* a civil rights action for damages; the decision must

1 have been successfully attacked *before* the civil rights action for damages is filed. The *Heck* rule  
 2 was first announced with respect to an action for damages, but the Supreme Court has since applied  
 3 the rule to an action that sought declaratory relief as well as damages. *See Edwards v. Balisok*, 520  
 4 U.S. 641, 648 (1997). If success in the § 1983 action would "necessarily demonstrate the invalidity  
 5 of confinement or its duration," the § 1983 action is barred no matter the relief sought (i.e., damages  
 6 or equitable relief) as long as the conviction has not been set aside. *Wilkinson v. Dotson*, 544 U.S.  
 7 74, 81-82 (2005). If Mr. Cross wants to challenge his state court conviction or sentence in  
 8 federal court, he may file a petition for writ of habeas corpus after he exhausts state court remedies  
 9 for each and every claim he wishes to present to the federal court. *See Preiser v. Rodriguez*, 411  
 10 U.S. 475, 500 (1973) ("when a state prisoner is challenging the very fact or duration of his physical  
 11 imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a  
 12 speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus").

### 13 CONCLUSION

14 1. Liberally construed the complaint states a cognizable § 1983 claim against Chuck Etchison  
 15 for excessive force against Mr. Cross. All other defendants and claims are dismissed.

16 2. The clerk shall issue a summons and the United States Marshal shall serve, without  
 17 prepayment of fees, the summons, a copy of the complaint, a copy of all the documents in the case  
 18 file, and a copy of the "consent or declination to magistrate judge jurisdiction" form upon Chuck  
 19 Etchison, the program director at Jericho Project, 51 Golden Aster Court, Brisbane, CA 94005.

20 3. In order to expedite the resolution of this case, the following briefing schedule for dispositive  
 21 motions is set:

22 a. No later than **October 23, 2015**, the defendant must file and serve a motion for  
 23 summary judgment or other dispositive motion. If the defendant is of the opinion that this case  
 24 cannot be resolved by summary judgment, the defendant must so inform the Court prior to the date  
 25 the motion is due. If the defendant files a motion for summary judgment, the defendant must  
 26 provide to the plaintiff a new *Rand* notice regarding summary judgment procedures at the time he  
 27 files such a motion. *See Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012). If the motion is based  
 28 on nonexhaustion of administrative remedies, the defendant must comply with the notice and

1 procedural requirements in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

2 b. The plaintiff's opposition to the summary judgment or other dispositive motion must  
3 be filed with the court and served upon the defendant no later than **November 20, 2015**. The  
4 plaintiff must bear in mind the notice and warning regarding summary judgment provided later in  
5 this order as he prepares his opposition to any motion for summary judgment.

6 c. If the defendant wishes to file a reply brief, the reply brief must be filed and served  
7 no later than **December 4, 2015**.

8 4. The plaintiff is provided the following notices and warnings about the procedures for  
9 motions for summary judgment:

10 The defendants [may make] a motion for summary judgment by which they seek to have your  
11 case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil  
12 Procedure will, if granted, end your case. [¶] Rule 56 tells you what you must do in order to  
13 oppose a motion for summary judgment. Generally, summary judgment must be granted when  
14 there is no genuine issue of material fact -- that is, if there is no real dispute about any fact that  
15 would affect the result of your case, the party who asked for summary judgment is entitled to  
16 judgment as a matter of law, which will end your case. When a party you are suing makes a  
17 motion for summary judgment that is properly supported by declarations (or other sworn  
18 testimony), you cannot simply rely on what your complaint says. Instead, you must set out  
19 specific facts in declarations, depositions, answers to interrogatories, or authenticated  
20 documents, as provided in Rule 56(e), that contradict the facts shown in the defendants'  
21 declarations and documents and show that there is a genuine issue of material fact for trial. If  
22 you do not submit your own evidence in opposition, summary judgment, if appropriate, may be  
23 entered against you. If summary judgment is granted, your case will be dismissed and there will  
24 be no trial.

18 *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998).

19 If a defendant files a motion for summary judgment for failure to exhaust administrative  
20 remedies, he is seeking to have the case dismissed. A plaintiff faced with such a motion can oppose  
21 it using the same methods as described above for other summary judgment motions. As with other  
22 defense summary judgment motions, if a motion for summary judgment for failure to exhaust  
23 administrative remedies is granted, the case will be dismissed and there will be no trial.

24 5. All communications by the plaintiff with the court must be served on a defendant's counsel  
25 by mailing a true copy of the document to the defendant's counsel. The court may disregard any  
26 document which a party files but fails to send a copy of to his opponent. Until a defendant's counsel  
27 has been designated, the plaintiff may serve a document by mailing a true copy of the document  
28 directly to the defendant, but once a defendant is represented by counsel, all documents must be

1 mailed to counsel rather than directly to that defendant.

2 6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further  
3 court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required before the  
4 parties may conduct discovery.

5 7. The plaintiff is responsible for prosecuting this case. The plaintiff must promptly keep the  
6 court informed of any change of address and must comply with the court's orders in a timely fashion.  
7 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal  
8 Rule of Civil Procedure 41(b). The plaintiff must file a notice of change of address in every pending  
9 case every time he is moved to a new facility or is released from custody.

10 8. The plaintiff is cautioned that he must include the case name and case number for this case  
11 on any document he submits to the court for consideration in this case.

12 **IT IS SO ORDERED.**

13 Dated: August 25, 2015

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16 LAUREL BEELER  
17 United States Magistrate Judge  
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